

# Alexander Mills

## **Victims or Defendants - Can there be Justice for All?**

The “Justice for All” White Paper (‘the paper’) proposes reforms which aim “to rebalance the system in favour of victims, witnesses and communities and to deliver justice for all, by building greater trust and credibility”<sup>1</sup>. Some of these proposals are now embodied in the Criminal Justice Bill (‘the Bill’). That the lot of the victim should be improved is uncontroversial - victims by definition need assistance. As a general expression of sentiment, delivering “justice for all” by favouring victims is incontestable. As a statement of public policy, such slogans may be at best superficial, and at worst a cynically misleading political exercise.

The use of the term “rebalance” is instructive. It implies, correctly, that any change to the criminal justice system has effects and repercussions, and that there are competing values and criteria which must be weighed. Protecting victims by incarcerating criminals is not the sole value at stake in the criminal justice system. If this were the case, universal and mandatory DNA identification would be uncontroversial, as this would lead to more convictions. This is not proposed in the paper or the Bill, because this measure is (presumably) judged to cause social harms which outweigh its benefits. Specifically, it would be an intrusion on the liberties of innocent people.

The negative effects of such a radical measure are obvious to us, because they would clearly affect us as individuals. The effects of some of the measures proposed in the paper and the Bill are less obvious, but no less potentially important.

Consider, in particular, the proposed reforms to the trial process. The measures proposed to “rebalance” the system include making changes to:

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<sup>1</sup> White Paper, Foreword

- “allow the use of reported evidence (‘hearsay’) where there is a good reason, such as where a witness cannot appear personally”<sup>2</sup>
- “allow the court to be informed of a defendant’s previous convictions where appropriate”<sup>3</sup>
- “give witnesses greater access to their original statements at trial”<sup>4</sup>

These proposals would each overturn rules which have developed over time as safeguards against unfair convictions. Obviously no-one is arguing against the proposition that “[t]he rules should be coherent, consistent and realistic”<sup>5</sup>. It is trite to state that “antiquated rules with arbitrary effects and unpredictable consequences need to be reformed”<sup>6</sup>. But to justify changes simply on the basis that they are necessary to shift the balance towards victims is unsatisfactory - and to cast aside existing rules as “antiquated” overlooks the fact that they are the products of centuries of judicial and jurisprudential reflection.

The paper argues more substantively that “Magistrates, judges and juries have the common sense to evaluate relevant evidence and should be trusted to do so”<sup>7</sup>. The criminal justice system depends on trusting magistrates, judges and juries - but history also shows that trust should be limited, that each of these participants must operate within a framework of rules which clearly defines and limits their role.

The rule changes proposed in the paper and Bill are not designed to eliminate irrational rules which favour only the guilty. The proposed changes, to shift the balance towards the victim, to make it easier to achieve successful prosecutions, would also result in more convictions of

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<sup>2</sup> White Paper, Page 12; see Criminal Justice Bill, Part 11 Chapter 2

<sup>3</sup> White Paper, Page 12; see Criminal Justice Bill, Part 11 Chapter 1

<sup>4</sup> White Paper, Page 13; see Criminal Justice Bill, Part 11 Chapter 2, s.104

<sup>5</sup> White Paper, Page 79

<sup>6</sup> White Paper, Page 28

<sup>7</sup> White Paper, Page 69

innocents. The balance between the benefits of convicting the guilty and the costs of convicting the innocent has traditionally been expressed in Blackstone's maxim that "it is better that ten guilty persons escape, than that one innocent suffer"<sup>8</sup>. This statement implies that imprisoning an innocent person is so undesirable that this outweighs the cost of having guilty persons in the community. In essence, it is a statement of the relative importance of the value of liberty and the value of convicting the guilty.

Changing these rules therefore implies a change in relative values. It represents a claim that the liberty of the innocent should be valued less, and convictions more. Is this claim justified? The statistics do not support the apparent public perception that the streets are being flooded with criminals. According to the paper, "the chance of being a victim of crime is the lowest it has been since the early 1980s"<sup>9</sup>. This is not a statement which suggests an imbalance requiring redress.

Has a decision been made that the liberty of the innocent is currently overvalued, that innocents imprisoned are worth the price of ensuring that fewer guilty persons are terrorising us on the streets? This may or may not be the case, but it is not a debate that has occurred, and it is not a debate apparent in the paper.

There should be a concerned suspicion that the proposed changes are justified not by principle but by relative perception of the two competing values. The need for convictions to redress the apparent terror on the streets is constantly portrayed in the news and entertainment media. The need to balance this against the loss of liberty to innocent defendants, even defendants who have committed previous crimes, is less perceptible. Arguably, the sacrifice of liberty is not a move made for the benefit of the victim, but a move made because of community fears about security. It is not justice for all - it is not justice for anyone. It is not even about justice. It is about security

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<sup>8</sup> Blackstone's Commentaries, Book IV, Chapter 27

<sup>9</sup> White Paper, Page 24

and perceptions of security - and perhaps about a government who sees its own security as dependant on those perceptions.

The rules in the criminal justice system are a balance which may from time to time require adjustment. Shifting the balance of the criminal justice system in favour of victims in the way described in the paper and proposed in the Bill may lead to more convictions and a greater sense of public security, and it is in all probability politically astute. But can one really feel more secure in the knowledge that a government is prepared to trade in such fundamental freedoms without engaging in more open and honest debate? Without such debate the promise of justice for all rings hollow.

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**26 November 2002**